

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

JUAN FERNANDEZ,

Petitioner,

No. C 13-4671 PJH (PR)

vs.

**ORDER REOPENING CASE
AND FOR RESPONDENT TO
SHOW CAUSE**

JEFFREY BEARD,

Respondent.

Petitioner, a state prisoner has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This case was dismissed without prejudice as petitioner had not paid the filing fee or filed an application to proceed in forma pauperis. After it was closed petitioner paid the filing fee, therefore the case will be reopened and the court will review the petition. Petitioner was convicted in Mendocino County, which is in this district, so venue is proper here. See 28 U.S.C. § 2241(d).

BACKGROUND

A jury convicted petitioner of first degree robbery, kidnaping to commit robbery, first degree burglary and assault with a deadly weapon. He was sentenced to eight years to life in prison and a determinate term of 22 years and eight months. Petitioner states that he appealed to the court of appeals and state supreme court, but those appeals were denied and his habeas petition to the California Supreme Court was also denied.

DISCUSSION

A. Standard of Review

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody

1 in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §
2 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet
3 heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An
4 application for a federal writ of habeas corpus filed by a prisoner who is in state custody
5 pursuant to a judgment of a state court must "specify all the grounds for relief available to
6 the petitioner ... [and] state the facts supporting each ground." Rule 2(c) of the Rules
7 Governing § 2254 Cases, 28 U.S.C. foll. § 2254. "[N]otice' pleading is not sufficient, for the
8 petition is expected to state facts that point to a 'real possibility of constitutional error.'"
9 Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir.
10 1970)). "Habeas petitions which appear on their face to be legally insufficient are subject
11 to summary dismissal." *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d 1102,
12 1108 (9th Cir. 1996) (Schroeder, J., concurring).

13 **B. Legal Claims**

14 As grounds for federal habeas relief, petitioner asserts: (1) the CALCRIM 400 jury
15 instruction violated his right to a jury trial and due process under the Sixth and Fourteenth
16 Amendments; (2) there was insufficient evidence to support the kidnaping to commit
17 robbery conviction; (3) there was prosecutorial misconduct; and (4) appellate counsel was
18 ineffective for failing to raise all of these claims. These claims are sufficient to require a
19 response.

20 **CONCLUSION**

21 1. The judgment entered on December 3, 2013, is **VACATED**, and this case is
22 **REOPENED**.

23 2. The clerk shall serve by regular mail a copy of this order and the second
24 amended petition and all attachments thereto on respondent and respondent's attorney, the
25 Attorney General of the State of California. The clerk also shall serve a copy of this order
26 on petitioner.

27 3. Respondent shall file with the court and serve on petitioner, within sixty days of
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1 the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules
2 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be
3 granted. Respondent shall file with the answer and serve on petitioner a copy of all
4 portions of the state trial record that have been transcribed previously and that are relevant
5 to a determination of the issues presented by the petition.

6 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with
7 the court and serving it on respondent within thirty days of his receipt of the answer.

8 4. Respondent may file a motion to dismiss on procedural grounds in lieu of an
9 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing
10 Section 2254 Cases. If respondent files such a motion, it is due fifty-six (56) days from the
11 date this order is entered. If a motion is filed, petitioner shall file with the court and serve
12 on respondent an opposition or statement of non-opposition within twenty-eight (28) days of
13 receipt of the motion, and respondent shall file with the court and serve on petitioner a reply
14 within fourteen days of receipt of any opposition.

15 5. Petitioner is reminded that all communications with the court must be served on
16 respondent by mailing a true copy of the document to respondent's counsel. Petitioner
17 must keep the court informed of any change of address and must comply with the court's
18 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
19 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). See *Martinez v.*
20 *Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

21 **IT IS SO ORDERED.**

22 Dated: December 17, 2013.



PHYLLIS J. HAMILTON
United States District Judge

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